

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** June 16, 2017

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Ramiro Garcia, Jr., Deputy Director
Office of Compliance and Enforcement

Docket No.: 2016-0485-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 111, Control of Air Pollution from Visible Emissions and
Particulate Matter
Amend Prescribed Burning Rules
Rule Project No. 2016-027-111-CE

Background and reason(s) for the rulemaking:

On April 6, 2016, the Texas Commission on Environmental Quality (commission or TCEQ) approved the initiation of rulemaking based on a petition received by the Texas Forestry Association (TFA). The petitioner requested that the commission amend 30 Texas Administrative Code (TAC) Chapter 111, Subchapter B, concerning Outdoor Burning, to provide specific requirements for prescribed burning conducted by Certified and Insured Prescribed Burn Managers (CPBMs) who are certified by the Prescribed Burning Board (PBB) of the Texas Department of Agriculture (TDA).

Scope of the rulemaking:

The adopted rulemaking amends the definitions in §111.203 and adds new §111.217.

A.) Summary of what the rulemaking will do:

The adopted rulemaking adds clarification and more specific language to the current rules related to prescribed burning conducted by CPBMs who are certified by the PBB. Amendments to the definitions in §111.203 addresses the petitioner's request and adds a new definition to TCEQ rules for CPBMs. New §111.217 aligns commission rules with TDA rules for CPBMs, as well as clarifies commission rules for CPBMs.

B.) Scope required by federal regulations or state statutes:

TCEQ is required to revise the state implementation plan.

C.) Additional staff recommendations that are not required by federal rule or state statute:

There are no additional staff recommendations for the adopted rulemaking.

Statutory authority:

Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, and 382.051; Texas Water Code, §§5.102, 5.103, and 5.105; and Federal Clean Air Act, 42 United States Code, §§7401 *et seq.*

Re: Docket No. 2016-0485-RUL

Effect on the:

A.) Regulated community:

This rulemaking will impact the specific regulated community of CPBMs to provide clear applicable requirements.

B.) Public:

This rulemaking would have a minimal effect on the public. It will provide specific requirements for CPBMs who conduct prescribed burning.

C.) Agency programs:

This rulemaking would have a minimal effect on agency programs.

Stakeholder meetings:

A stakeholder meeting was held on June 16, 2016, at the TCEQ in Austin. Prescribed burn managers, industry, state agencies, and the public were in attendance. In general, stakeholders supported most of the recommended changes in the petition, however the TCEQ received many comments suggesting that additional changes be made to the Outdoor Burning rules. No additional changes were made in response to stakeholder comments as they were outside the scope of the petition.

Public comment:

The commission held a public hearing on February 28, 2017. The comment period closed on March 6, 2017. The commission received comments from Acorn Forestry, TDA, and TFA.

TDA requested TCEQ not adopt proposed rule changes and should defer to TDA for prescribed burning. TDA commented that the jurisdictional overlap of TCEQ and TDA regarding prescribed burning creates ambiguity regarding regulatory authority, and could subject CPBMs to enforcement actions by both agencies.

Acorn Forestry and TDA requested the removal of requirements for burning to occur when predicted wind speed is 6 - 23 miles per hour (mph) or allow burning at speeds less than 6 mph. Acorn Forestry and TDA requested the removal of requirements to post flag-persons when smoke impacts a road or highway or only require flag-persons on roadways with a posted speed limit over 30 mph. Acorn Forestry and TDA requested that the allowed start time to commence burning be changed from one hour after sunrise to sunrise.

TFA requested revising the definition of "Structure containing sensitive receptors" to exclude hunting camps. Acorn Forestry requested an exemption from obtaining authorization from sensitive receptors. TFA recommended including additional language to clarify that CPBMs must comply with §111.217 and not §111.219.

Significant changes from proposal:

Changes were made to §111.217(6)(B), adopted as §111.217(5)(B), in response to comments from Acorn Forestry and TFA. The language was revised to state that burning

Re: Docket No. 2016-0485-RUL

shall not commence when surface wind speeds are predicted to be less than five miles per hour or greater than 23 miles per hour instead of less than six miles per hour or greater than 23 miles per hour as proposed.

Changes were made to proposed §111.217(6)(A), adopted as §111.217(5)(A), in response to comments from Acorn Forestry and TFA. The “flag-person” requirement in proposed §111.217(5) was removed. The language was revised to state that burning shall commence no earlier than sunrise in lieu of one hour after sunrise as proposed.

Changes were made to the introductory paragraph in §111.217 in response to a comment from TFA. Language to clarify that §111.219 is not applicable to CPBMs was added.

Potential controversial concerns and legislative interest:

After an evaluation of safety and air quality concerns, not all of the recommended changes in the petition were included in this rulemaking. Senator Robert Nichols and Representative Trent Ashby filed identical companion bills, Senate Bill 960 and House Bill 1672 during the 85th Legislative Session pertaining to TCEQ’s regulation of prescribed burning that could impact this rulemaking.

Does this rulemaking affect any current policies or require development of new policies?

The adopted rulemaking will not affect any current policies or require development of new policies.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If the adopted rulemaking does not go forward, the outdoor burning rules for CPBMs will not be clearly defined, which could lead to confusion with TDA requirements. In addition CPBMs would be subject to the General Requirements for Allowable Outdoor Burning in §111.219.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: February 3, 2017

Anticipated *Texas Register* adoption publication date: July 28, 2017

Anticipated effective date: August 3, 2017

Six-month *Texas Register* filing deadline: August 3, 2017

Agency contacts:

Amancio Gutierrez, Rule Project Manager, Program Support, (512) 239-3770

Amy Prescott, Staff Attorney, (512) 239-3668

Kris Hogan, Texas Register Rule/Agenda Coordinator, (512) 239-6812

Attachments:

Petition

Petition Order

cc: Chief Clerk, 2 copies

Commissioners

Page 4

June 16, 2017

Re: Docket No. 2016-0485-RUL

Executive Director's Office

Erin Chancellor

Stephen Tatum

Jim Rizk

Office of General Counsel

Amancio Gutierrez

Kris Hogan